SUPREME COURT
OF THE UNITED STATES

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           IN THE SUPREME COURT OF THE UNITED STATES

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NATHAN VAN BUREN,                        )

              Petitioner,                )

                  v.                     ) No. 19-783

UNITED STATES,                           )

              Respondent.                )

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Pages:   1 through 67

Place:   Washington, D.C.

Date:    November 30, 2020
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3   NATHAN VAN BUREN,   )

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10   Washington, D.C.

11   Monday, November 30, 2020

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13   The above-entitled matter came on for

14   oral argument before the Supreme Court of the

15   United States at 11:36 a.m.

16

17   APPEARANCES:

18   JEFFREY L. FISHER, ESQUIRE, Stanford, California;

19   on behalf of the Petitioner.

20   ERIC J. FEIGIN, Deputy Solicitor General,

21   Department of Justice, Washington, D.C.;

22   on behalf of the Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:36 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument next in Case 19-783, Van Buren versus

5   United States.

6   Mr. Fisher.

7   ORAL ARGUMENT OF JEFFREY L. FISHER

8   ON BEHALF OF THE PETITIONER

9   MR. FISHER: Mr. Chief Justice, and

10   may it please the Court:

11   The CFAA is an anti-hacking statute.

12   It prohibits obtaining information from a

13   computer without authorization. And to ensure

14   comprehensive coverage, the statute also

15   prohibits "exceeding authorized access." As

16   Judge Kozinski put it, this -- this ensures that

17   the statute covers not just outside but also

18   inside hackers.

19   In this case, however, the government

20   seeks to transform the supplemental prong of the

21   CFAA into an entirely different prohibition. In

22   the government's view, this prong covers

23   obtaining any information via computer that the

24   accessor is not entitled "under the

25   circumstances" to obtain.

 1   It is no overstatement to say that

 2   this construction would brand most Americans

 3   criminals on a daily basis. The scenarios are

 4   practically limitless, but a few examples will

 5   suffice. Imagine a secretary whose employee

 6   handbook says that her e-mail or Zoom account

 7   may be used only for business purposes. Or

 8   consider a person using a dating website where

 9   users may not include false information on their

10   profile to obtain information about potential

11   mates. Or think of a law student who is issued

12   a log -- log-in credentials for Westlaw or Lexis

13   for educational use only.

14   If the government is right, then a

15   computer user who disregards any of these stated

16   use restrictions commits a federal crime. For

17   example, any employee who used a Zoom account

18   over Thanksgiving to connect with distant

19   relatives would be subject to the grace of

20   federal prosecutors.

21   The main argument the government

22   offers in response to that startling result is

23   that a single two-letter word in the CFAA's

24   definition of "exceeds authorized access," the

25   term "so," demands it.

1   But that word requires no such thing.

2   The word simply clarifies that a use -- that the

3   user must be prohibited from obtaining the

4   information merely by a computer. It relieves

5   the government of having to negate every

6   possible alternative means by which the

7   defendant might permissibly have obtained the

8   information at issue.

9   But that is all the word does. It

10   does not transform the CFAA into a sweeping

11   Internet police mandate. The Court should

12   reverse.

13   And I'm happy to take any questions.

14   CHIEF JUSTICE ROBERTS: Mr. Fisher, in

15   Musacchio versus United States, this is what we

16   said: That statute provides two ways of

17   committing the crime of improperly accessing a

18   protected computer: obtaining access without

19   authorization and obtaining access with

20   authorization but then using that access

21   improperly.

22   You didn't mention that case in your

23   opening brief. The government relied on it.

24   You didn't mention it in your reply brief. I

25   wonder what your -- your answer to that quote

1   is.

2   MR. FISHER: Mr. Chief Justice, my

3   understanding in that case was the Court was

4   simply giving a thumbnail summary of how the

5   statute works. Of course, the question

6   presented here was not presented there. And, in

7   fact, not even the "exceeds authorized access"

8   prong was at issue there in the conspiracy issue

9   the Court reached.

10   I understood what the Court to be

11   doing in that summary simply to be using the

12   word "improperly" as a shorthand for whatever it

13   is that the "exceeds authorized access" prong

14   prohibits and then moving -- and moving right

15   along.

16   CHIEF JUSTICE ROBERTS: Well, but

17   that's not what it -- that's not what it says.

18   It says -- and this seems to me to go to the

19   point at issue here -- that the second way you

20   can violate it is by obtaining access with

21   authorization but then using that access

22   improperly. Doesn't --

23   MR. FISHER: Well, Mr. Chief --

24   CHIEF JUSTICE ROBERTS: Go ahead.

25   MR. FISHER: I'm sorry. I -- I -- I

1   think my answer would simply be just to look at

2   the words of the statute. And I think the

3   definition of "exceeds authorized access"

4   doesn't talk about improper use. It talks about

5   obtaining information that the accessor is not

6   entitled so to obtain.

7   And as we've explained in our papers,

8   we think the definition of that term leaves out

9   improper purposes because we know Congress, in

10   fact, had those -- those words in the very

11   original provision of the statute and they took

12   them out in 1986. And we know from other

13   enactments that we've cited, for example, at

14   page 19 of our blue brief, that when Congress

15   wants to criminalize or otherwise prohibit

16   improper use or unauthorized purposes, it does

17   so expressly.

18   CHIEF JUSTICE ROBERTS: Just to make

19   sure I have your interpretation correct, if --

20   if a -- if a bank has a policy barring employees

21   from accessing Facebook, and an employee exceeds

22   her authorized access and would be covered if

23   she goes onto Facebook, but it wouldn't be a

24   violation if she used that access to look up

25   customers' Social Security numbers to sell them

1   to a third party, right?

2   MR. FISHER: I'm not sure I follow,

3   Mr. Chief Justice. I think my position is that

4   it would not violate the CFAA for the employee

5   to go on Facebook.

6   If you're asking me about the Social

7   Security numbers, for example, it would depend

8   on whether the employee actually had access to

9   that information. As we explain in our brief,

10   if -- if that employee has to use certain log-in

11   credentials that -- of somebody else's, for

12   example, to get that information, that would not

13   -- that would -- that would be a violated --

14   violation of the statute.

15   CHIEF JUSTICE ROBERTS: Thank you.

16   MR. FISHER: The question again --

17   CHIEF JUSTICE ROBERTS: Justice

18   Thomas.

19   JUSTICE THOMAS: Thank you, Mr. Chief

20   Justice.

21   Mr. Fisher, you gave a brief list -- a

22   list, a parade of horribles. In CA 11, this has

23   been the rule for a while. Has there been --

24   can you give us some actual examples of -- of

25   that happening, someone getting -- violating

1   this provision because of accessing Zoom or

2   something like that, or Facebook?

3   MR. FISHER: Justice Thomas, not in

4   the Eleventh Circuit, but the papers discuss,

5   for example, the Drew case out of the Ninth

6   Circuit, which was issue -- which was before the

7   Ninth Circuit issued the Nosal decision, where

8   somebody was prosecuted for misusing MySpace.

9   There's a case involving Ticketmaster that we've

10   cited in the brief.

11   But, more generally, Justice Thomas,

12   I'd also point you to two other things. One is

13   remember that the language of this statute has

14   its own deterrent effect. And so, for people

15   who use the Internet every day, they have to be

16   aware of the criminal law, both on the criminal

17   side and, remember, this statute has a civil

18   component.

19   And I think that's the -- the critical

20   thing, is that the Court said in Marinello and

21   many other cases that you can't construe a

22   statute simply on the assumption the government

23   will use it responsibly. So, if the government

24   has withheld the full brunt of the federal

25   prosecutorial power, that doesn't enable the

1   Court to simply construe the statute on that

2   promise.

3   And so I think that's the -- that's

4   the critical problem with the government's point

5   here.

6   I'd also point you to the Committee

7   for Justice brief, which gives another example

8   of just not everyday Zoom use or Facebook use

9   but also political prosecutions, like the case

10   in Kelly last term and McDonnell a little bit

11   earlier, and I think there's a persuasive case

12   made in that brief how any one of those

13   prosecutions could simply be repackaged as a

14   CFAA prosecution if the government were to win

15   here.

16   JUSTICE THOMAS: So you seem to be

17   making a point that, well, if you don't have the

18   authority to access a certain area, for example,

19   you're -- you have a level A clearance, but you

20   access information that is at a level B or

21   something, that -- that that would be --

22   certainly would -- would -- would exceed

23   authorization.

24   But why can't you have the exact same

25   thing on the other end, that is, that you have

1   authority to access information, but you are

2   limited -- that authorization is limited as to

3   what you can do with it?

4   For example, you work for a car rental

5   and you have the access to the GPS, but rather

6   than use it to determine the location of a car

7   that may be missing, you use it to follow a

8   spouse, or as in this case, the -- the use of

9   the information is a problem.

10   So I don't understand why you make the

11   distinction between these two levels or ways

12   that you can have or not have authorization.

13   MR. FISHER: Because -- because of the

14   language of the statute, Justice Thomas. The

15   statute simply asks whether the user is -- is

16   entitled to obtain the information.

17   And to use your car rental example,

18   the user there is entitled to obtain that GPS

19   information.

20   Now it may be a breach of company

21   policy. It may be -- in the case of the

22   stalking example that the government gives in

23   its brief like that, it may be a different

24   crime, but the question in -- in front of you

25   here is whether it violates the CFAA as enacted

1   and existing right now. And so my only --

2   CHIEF JUSTICE ROBERTS: Justice

3   Breyer.

4   JUSTICE BREYER: All right. The

5   argument on the legislative history I'm

6   interested in because there was an earlier

7   statute which did say pretty clearly it's a

8   crime to use your access for purposes to which

9   such authorization does not extend. And then

10   that was changed to the present language. But,

11   at that time, the history says they didn't mean

12   to make a substantive change.

13   So what do you respond to that?

14   MR. FISHER: Well, two things, Justice

15   Breyer. Remember, first of all, that that

16   original provision of the statute was

17   exceedingly narrow. It applied just to certain

18   federal employees and certain information.

19   When Congress changed that law two

20   years later in 1986, you're right that at one

21   point of the committee report it talked about

22   simply clarifying the statute, but in the other

23   part of the committee report, dealing with

24   exactly the same words, what the -- what the --

25   what Congress said is that they had removed one

1   of the murkier grounds for -- for liability and

2   refocused the statute on its principal object.

3   And so you have those cross-cutting

4   pieces of legislative history. And even the

5   government, I would stress, does not argue that

6   all that amendment did is clarify. The

7   government says that that amendment actually

8   dramatically expanded the statute to go even

9   beyond improper purposes to a violation of any

10   stated use restriction.

11   So nobody here is arguing that the

12   statute didn't change in 1986. It's just a

13   question of whether it expanded dramatically or

14   took away that purpose language.

15   And I think, Justice Breyer, the other

16   thing I would stress about the legislative

17   history is, because this is a criminal case, we

18   think it's improper if not, at the very least,

19   very dangerous to rely on legislative history to

20   resolve ambiguity.

21   Instead, what you should look to are

22   things like the Rule of Lenity and the principle

23   of last term in Kelly and in Marinello where the

24   Court has always resisted construing ambiguity

25   in federal criminal statutes to vastly enlarge

1   the sweep of criminal liability.

2   JUSTICE BREYER: Thank you.

3   CHIEF JUSTICE ROBERTS: Justice Alito.

4   JUSTICE ALITO: Mr. Fisher, in this

5   case, we've received amicus briefs from a number

6   of organizations and individuals who are very

7   concerned about what your interpretation would

8   mean for personal privacy.

9   There are many government employees

10   who are given access to all sorts of highly

11   personal information for use in performing their

12   jobs. But, if they use that for personal

13   purposes to make money, protect or carry out

14   criminal activity, to harass people they don't

15   like, they can do enormous damage.

16   And the same thing for people who work

17   for private entities. Think of the -- the

18   person in the fraud detection section of a bank

19   who has access to credit card numbers and uses

20   that information to sell for a personal profit.

21   Do you think that none of that was of

22   concern when Congress enacted this statute?

23   MR. FISHER: Justice Alito, with due

24   respect, I do not think it was. What Congress

25   was concerned about was computer hacking, and

1   that's up and down the legislative history, this

2   new problem of computer -- of -- of hacking.

3   And I think that the two things I

4   would add to that, because I understand the

5   concern, and there -- there are powerful briefs

6   about the policy question you raise, and it's

7   possible Congress may want to step in and

8   regulate that and even criminalize it to some

9   effect, but the question is, what does the

10   statute you have in front of you right now do?

11   And the problem with the government's

12   view or those -- or those amicus briefs is

13   there's no way to reach the federal -- the

14   government employee or the -- or the financial

15   employee that you're imagining without also

16   reaching every other ordinary employee who

17   violates an employee handbook --

18   JUSTICE ALITO: Well, let me ask you

19   -- let me --

20   MR. FISHER: -- every student who

21   violates the course --

22   JUSTICE ALITO: Yeah, let me ask you

23   about that, because you rely heavily on former

24   Judge Kozinski's parade of horribles, but, in

25   doing that, you read the provisions of this

1   section very, very broadly.

2   Take -- take the example of the person

3   who puts -- who lies about weight on a dating

4   website. How would that be a violation of this

5   statute?

6   MR. FISHER: Well, under the

7   government's theory, it's a violation to use a

8   website in violation of the terms of service. I

9   think the government --

10   JUSTICE ALITO: Well, but the statute

11   says --

12   MR. FISHER: -- its own theory of this

13   fact --

14   JUSTICE ALITO: -- if you obtain

15   information, obtain or alter information. How

16   is that person obtaining or altering

17   information?

18   MR. FISHER: Well, I think, typically,

19   when you use it --

20   JUSTICE ALITO: They're putting in

21   information.

22   MR. FISHER: No, it's -- it's not the

23   entering of the false information, Justice

24   Alito. It -- it's then obtaining information on

25   a dating website, for example, about a potential

1   mate. So you are obtaining information from the

2   website through a profile that is false, and

3   that violates the terms of service of that

4   website, and it falls squarely within the

5   government's theory because you have obtained

6   that -- you've gotten on that website with

7   authorization, with your log-in credentials,

8   because you're a single person and not married,

9   et cetera, and you have obtained information in

10   violation of the stated use restrictions on that

11   website. So I don't see how the government gets

12   out of that hypothetical.

13   JUSTICE ALITO: All right. Thank you.

14   CHIEF JUSTICE ROBERTS: Justice

15   Sotomayor.

16   JUSTICE SOTOMAYOR: Counsel, I very

17   much understand the concerns of my colleagues

18   about the amicus briefs of illegal conduct that

19   this would not cover, including the one at issue

20   here, your client, a local police officer -- not

21   your client, I'm sorry -- yes, your client -- a

22   local police officer who paid for information he

23   got from a federal computer system, which -- for

24   personal reasons.

25   But the fact that there isn't this

1   federal crime doesn't mean this conduct isn't

2   prosecuted in other ways, does it?

3   MR. FISHER: No. For example, my

4   client in this case was prosecuted also under a

5   separate count that's pending on remand. And as

6   I said in the -- in our reply brief, other types

7   of misconduct the government talks about, like

8   the stalking example or like mis-obtaining

9   health information, misuse of trade secrets, all

10   of those things can be prosecuted under

11   different federal statutes.

12   And if -- if -- if Congress decided,

13   it could enact the -- the proposal the

14   Department of Justice has given it a couple

15   times over the last several years to expand the

16   CFAA in certain limited respects.

17   But, as I was trying to say earlier,

18   Justice Sotomayor, the core of the problem is

19   there is no foothold in the statute to inch the

20   statute forward to cover the conduct in this

21   case without also covering all kinds of other

22   violations of purpose-based restrictions that

23   could appear in terms of service contracts,

24   employee handbooks, course syllabuses, syllabi

25   at universities, or even oral dictates.

1   So just take -- go back to the facts

2   of this case and imagine Mr. Van Buren's

3   supervisor had told him, please don't do any

4   license plate searches this evening until you've

5   finished your paperwork, or tomorrow, when

6   you're out on patrol --

7   JUSTICE SOTOMAYOR: Counsel --

8   counsel, are -- counsel, are there targeted

9   changes that could be made to limit the reach of

10   this statute to exactly the fears that I think

11   one of my colleagues expressed of the kind of

12   conduct that we would think of as subjecting

13   someone to punishment?

14   I know, for example, most statutes

15   have a obtaining information and using it for

16   financial gain.

17   MR. FISHER: Yes, Justice Sotomayor,

18   the government itself has proposed amendments to

19   the statute that we cite in our brief.

20   Professor Kerr in his amicus brief describes

21   those proposals as well and endorses them. And

22   -- but I think, again, the critical point I

23   would make is that that should come from

24   Congress.

25   Just back to this statute, as I was

    1   saying, what about oral directives to a -- to an

    2   officer that tomorrow, when you're out on

    3   patrol, don't run license plates, just in

    4   ordinary traffic stops; I want you to be more

    5   efficient.

    6   You know, there's any number of

    7   questions that would have to be addressed. Just

    8   look at subsection 1 of this statute, Justice

    9   Sotomayor. It does restrict federal employees'

    10   use of information in giving it to third

    11   parties. That is not part of the provision at

    12   issue here. So -- so, again, that would be a

    13   choice for Congress to make, and all these

    14   things should be done on a legislative basis.

    15   CHIEF JUSTICE ROBERTS: Justice Kagan.

    16   JUSTICE SOTOMAYOR: Thank you,

    17   counsel.

    18   JUSTICE KAGAN: Mr. Fisher, could you

    19   tell me again what you think "so" means?

    20   MR. FISHER: "So" means in the manner

    21   so described. That's the Black's Law

    22   definition. And so translated to this statute,

    23   what it means is that you've accessed and

    24   obtained the information via computer as opposed

    25   to some other means.

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 1              JUSTICE KAGAN:  So could -- could you
 2    just parse that for me a little bit?  In a -- in
 3    a manner so described asks for some kind of
 4    reference back.  So what are we referring back
 5    to on your theory?
 6              MR. FISHER:  You're referring back to
 7    -- to "access a computer with authorization."
 8              So, Justice Kagan, two things that
 9    might flesh this out for you.  One is we give an
10    example of another federal statute on page 2 of
11    our yellow brief that uses "so" in this manner.
12    It just picks up what was said before, that was
13    earlier.
14              And maybe the government's own
15    hypothetical, I think, is the best way this
16    plays out, where the government worries about a
17    federal contractor obtaining salary information
18    from a salary database that he does not have
19    access to.  And what "so" does is it prohibits
20    that person from defending himself in a
21    prosecution for hacking into that database by
22    saying, oh, I could have filed a FOIA request or
23    I could have called the employees themselves and
24    asked them what they made, and, therefore, I was
25    entitled to obtain the information.
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1   That defense is off limits because of

2   the word "so." And, in fact, in that way, "so"

3   helps the government.

4   JUSTICE KAGAN: Okay. On your parade

5   of horribles, a similar question to Justice

6   Alito's, but one of your -- the -- the -- the

7   features of your parade is -- is an employee

8   checking Instagram at work. How is that

9   obtaining or altering information?

10   MR. FISHER: It's -- it's obtaining

11   information because you are literally obtaining

12   the words or pictures out of Instagram, and it

13   would violate the government's rule. Remember,

14   the prosecutor himself told the jury this at

15   closing argument, it would violate the

16   government's rule because the employee would be

17   at least theoretically prohibited from using her

18   work computer for personal reasons.

19   And so checking Instagram through your

20   work computer would be an improper purpose. It

21   would be an improper use. And you would obtain

22   the information from the computer in the form of

23   those pictures or -- or words or whatever they

24   might be.

25   JUSTICE KAGAN: Thank you, Mr. Fisher.

1   CHIEF JUSTICE ROBERTS: Justice

2   Gorsuch.

3   JUSTICE GORSUCH: Good morning,

4   Mr. Fisher. Picking up on your parade of

5   horribles, could you explain to us what the

6   constitutional implications are of your parade?

7   Just to give you an opportunity, rather than

8   just make a policy argument, try and link it up

9   to something bigger.

10   MR. FISHER: Thank you, Justice

11   Gorsuch. I think the -- there are two

12   constitutional problems. One are the First

13   Amendment problems with certain applications of

14   -- of -- of -- of the government's rule that are

15   described in the amicus brief. Secondly,

16   there's the vagueness problem, and that's what

17   I'll focus on.

18   Under the government's view, remember,

19   using -- obtaining information via computer that

20   you're not entitled "under the circumstances to

21   obtain" violates the statute. That is an

22   impossible vagueness problem because either one

23   of two things has to be correct.

24   Either "under the circumstances" means

25   literally every possible circumstance you could

1   imagine, right down to somebody orally telling

2   you not to do that. Imagine a parent telling --

3   telling her teenager, don't use Instagram

4   tonight until your homework is done or don't use

5   Face -- Facebook to -- to talk to your friends.

6   And so there's -- the opportunities

7   for prosecutorial discretion are probably

8   broader than any statute the Court has ever seen

9   if the government is right in literal terms.

10   The only alternative is that "under

11   the circumstances" somehow puts some of those

12   circumstances in and some of them out. But

13   that's a wholly indeterminate problem that I

14   think violates just the most basic fair notice

15   principles of the criminal law.

16   JUSTICE GORSUCH: And then, on the

17   reverse parade of horribles we've heard from the

18   other side, I guess I'm struggling to imagine

19   how -- how long that parade would be given the

20   abundance of criminal laws available.

21   So, if this one didn't cover that kind

22   of conduct, but there were troublesome forms of

23   it, like your client's behavior in this case,

24   misusing a police database, I assume there are

25   ample state laws available that criminalize a

1   lot of that conduct. Am I mistaken?

2   MR. FISHER: No. In fact, this case

3   comes from Georgia, and Georgia itself has a

4   statute about -- about hacking or otherwise

5   misusing computer information. The government,

6   as we point out in our -- in our reply brief,

7   the government gave a few hypotheticals in its

8   brief, and almost every one of them is already

9   addressed by some other provision of the -- even

10   the U.S. Code, let alone state law.

11   And -- and even -- remember, my client

12   himself has already lost his job and has other

13   forms of punishment that have already been

14   brought to bear. So, if Congress decides

15   somehow that is not enough and it wants the CFAA

16   to also be available in situations like this, it

17   could amend the statute. But -- but I don't

18   think there's anything like a comparable problem

19   on the other side in terms of the sort of

20   breadth issue in front of the Court.

21   CHIEF JUSTICE ROBERTS: Justice

22   Kavanaugh.

23   JUSTICE KAVANAUGH: Thank you, Mr.

24   Chief Justice.

25   And good afternoon, Mr. Fisher.

1   Picking up on Justice Gorsuch's question there

2   at the end and following up on questions from

3   earlier, one of the concerns, I suppose, is

4   government employees or financial company

5   employees or healthcare company employees who

6   have access to very sensitive personal

7   information, then disclose it.

8   And I'd appreciate if you could give

9   us a sense of the federal statutes that you

10   think would cover such -- such disclosures, if

11   any. I -- I take your reference to state

12   statutes, but are there any federal statutes

13   that you want to identify that would cover that

14   kind of situation?

15   MR. FISHER: Sure. I think I'd start

16   with page 19 of our blue brief, Justice

17   Kavanaugh, where we cite a federal statute that

18   prohibits obtaining classified information and

19   using it for an unauthorized purpose. So that's

20   one very important statute. We cite a couple of

21   others involving Social Security Administration

22   information. There's also the trade secrets

23   statute that was passed in 1996.

24   Again, this circles back to Justice

25   Breyer's question, but, remember, that was

 1   passed right alongside amendments to the CFAA.

 2   And so, when Congress wanted to criminalize an

 3   improper purpose, it knew exactly how to do so

 4   when it did so with respect to trade secrets.

 5   So I think those are the ones that I would

 6   highlight.

 7   The government, of course, in this

 8   case also tried to use the wire fraud statute,

 9   and that may be available in some situations as

10   well. So I think you have for the most part

11   already fairly comprehensive coverage.

12   And as I said --

13   JUSTICE KAVANAUGH: Counsel, can I

14   interrupt --

15   MR. FISHER: -- I'll just say it one

16   more time --

17   JUSTICE KAVANAUGH: Sorry to

18   interrupt, Mr. Fisher. The 1984 version of the

19   statute likely would have covered this kind of

20   activity. Why do you think Congress would have

21   narrowed it in 1986 when they were so concerned

22   about this kind of activity?

23   I get your textual point, but I'm just

24   trying to figure out why Congress would have

25   narrowed it in that sense?

1   MR. FISHER: Well, for two reasons, I

2   think, Justice Kavanaugh. One is, remember, it

3   actually would not have covered this case in

4   1984 because that statute dealt only with

5   federal employees and --

6   JUSTICE KAVANAUGH: Yeah.

7   MR. FISHER: -- certain particular

8   kinds of information.

9   JUSTICE KAVANAUGH: Yeah, this -- this

10   kind of --

11   MR. FISHER: And I think that's --

12   JUSTICE KAVANAUGH: -- I take your --

13   I take your point.

14   MR. FISHER: -- getting at the answer,

15   is that when Congress expanded the statute

16   eventually to cover all computers, basically, in

17   the United States, it also did, at the same

18   time, remove that murky ground of liability

19   because it was not, as Congress said in the

20   report, the core of the statutory problem.

21   JUSTICE KAVANAUGH: Yes. No, that's

22   -- I take your point and I meant to say this

23   kind of activity, right, not this case, but --

24   and in a different context, and I take your

25   point about the kind of computers covered.

1   Why wouldn't a mens rea requirement

2   solve your problems if the Court were to read

3   "intentionally" to require knowledge of the law,

4   not just the facts?

5   MR. FISHER: Well, I -- I think the

6   most the mens rea requirement could require

7   would be knowledge that you are violating a use

8   restriction and that the --

9   JUSTICE KAVANAUGH: Well, what if we

10   read it -- let me just challenge the -- your

11   premise. What if we read it to avoid the

12   concerns to require knowledge of the law, as we

13   do with statutes that use the term "willfully,"

14   for example?

15   MR. FISHER: I think even there,

16   Justice Kavanaugh, it would just be such a

17   remarkably broad statute, and -- and then -- and

18   then you'd -- you'd have the problem of people

19   who use Westlaw for personal reasons, they use

20   their work computers for personal reasons, they

21   use any number of other websites, as I was

22   describing, and are told on a daily basis by

23   supervisors and parents and all kinds of other

24   people, don't use the computer for this.

25   CHIEF JUSTICE ROBERTS: Thank you,

1   counsel.

2   MR. FISHER: And I do think --

3   CHIEF JUSTICE ROBERTS: Justice

4   Barrett.

5   JUSTICE BARRETT: Good afternoon, Mr.

6   Fisher. We've been focusing on the "exceeds

7   authorized access" prong, you know, which is the

8   prong that mattered for Mr. Van Buren. But I

9   want to ask you how that prong relates to the

10   other prong, the "accesses a computer without

11   authorization" prohibition.

12   Let's imagine that Van Buren faced a

13   very firm departmental policy that said he could

14   not use the computer itself for any personal

15   purpose, and he gets into the computer and does

16   what he did here and looks up license plates for

17   a personal use.

18   Has he violated the earlier prong, the

19   "accesses a computer without authorization"

20   prong?

21   MR. FISHER: I think probably not,

22   Justice Barrett. I think the question you're

23   asking raises the question described in some of

24   the amicus briefs about whether the -- I'm

25   sorry, the "without authorization" prong covers

1   just code-based restrictions or other -- other

2   kinds of directives.

3   And I think the best evidence I can

4   give you that it covers just code-based

5   restrictions is subsection 6 at the top of 3(a)

6   of the government's appendix. This is the

7   statute --

8   JUSTICE BARRETT: Well, let me

9   interrupt you for one second, Mr. Fisher,

10   because I'm actually getting, I think, at a

11   different point, perhaps inartfully.

12   It seems to me that the way that

13   you're reading this statute uses authorization

14   as an on/off switch, you know, either you're

15   authorized to use a computer or you're not;

16   either you're authorized to get into a

17   particular database or get a piece of

18   information or you're not.

19   So, here, Van Buren could get the

20   license plates, and it didn't matter if he was

21   getting them for a reason that he was not

22   supposed to get them for. So it -- it seems to

23   me that you are looking at authorization in a --

24   in a bright gates up or gates down kind of way,

25   whereas the government is looking at scope of

1   authorization as included.

2   So, for example, my baby-sitter might

3   have a key to my car so she can pick up my kids

4   from school, but then she uses the car to go run

5   some personal errands. She's exceeded the scope

6   of her authority.

7   And I guess what I'm trying to get at

8   is, why should we understand entitlement or

9   authorization to be just an on/off switch and

10   not to have a scope component?

11   MR. FISHER: Well, I think for two

12   reasons. One is that the statute itself doesn't

13   have a scope component or a purpose component or

14   anything like that. It simply asks whether the

15   person -- now I'm back to our prong -- was

16   entitled to obtain the information. And the

17   answer here is yes, he was, and that --

18   JUSTICE BARRETT: But doesn't the idea

19   of entitlement or authorization itself have a

20   scope component? That's what we would think of

21   in, you know, an agent's authority that the

22   principal has given him, for example.

23   MR. FISHER: It can sometimes, Justice

24   Barrett. I don't disagree with that. And so --

25   but the question is whether it necessarily does.

1   We don't think as a statutory construction

2   matter it necessarily does.

3   And when you compare this to other

4   statutes that do carve out improper purpose, we

5   think that's evidence that Congress didn't --

6   didn't think this was one of those kinds of

7   statutes.

8   And so -- so I think that's the other

9   -- the other piece of it, is to compare back

10   again to the prong that you started with, which

11   is the "without authorization" prong.

12   We know from -- from the provision I

13   was starting to read to you that Congress

14   thought of that as sort of a password-type

15   restriction or a -- or a technological-based

16   restriction. And that's what Congress was

17   concerned about, not other kinds of softer

18   scope-based restrictions.

19   JUSTICE BARRETT: Thank you, Mr.

20   Fisher.

21   CHIEF JUSTICE ROBERTS: A minute to

22   wrap up, Mr. Fisher.

23   MR. FISHER: Thank you. I think, Mr.

24   Chief Justice, what I'd leave you with is the

25   dialogue that I was just having with Justice

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 1    Barrett and Justice Kavanaugh.
 2              Just the core problem here is that
 3    once you take -- if you think the statute is
 4    ambiguous as to whether or not scope
 5    restrictions or purpose restrictions come in,
 6    the statute gives you no tools to distinguish
 7    the kinds of hypotheticals, some of which are
 8    troubling and some of which are more everyday,
 9    like Justice Barrett was asking me about -- you
10    cannot distinguish all those hypotheticals from
11    the ones that -- that the government wants to
12    point to the most troubling.
13              So you have this cascade of
14    contract-based restrictions, employee handbook
15    restrictions, course syllabus restrictions, oral
16    restrictions, all the other things that could --
17    that can directly restrict the scope of use in a
18    way that, even as Justice Kavanaugh imagined, if
19    the reader knew, if the user knew that that
20    violated the statute, and that would be just the
21    vast sweeping criminal law that would bring the
22    over-criminalization concerns this Court has had
23    over the last several years really home to roost
24    in just one single statute.  And so we urge you
25    not to go that far in this case.
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1   CHIEF JUSTICE ROBERTS: Thank you,

2   counsel.

3   Mr. Feigin.

4   ORAL ARGUMENT OF ERIC J. FEIGIN

5   ON BEHALF OF THE RESPONDENT

6   MR. FEIGIN: Thank you, Mr. Chief

7   Justice, and may it please the Court:

8   I don't think you heard my friend

9   spend much time on the text, and I want to start

10   right there. In the words of Section 1030,

11   Petitioner used his access, that is, the

12   credentials entrusted to him as a police

13   officer, to obtain database information that he

14   was "not entitled so to obtain" when he looked

15   up a license plate in return for a bribe.

16   But such serious breaches of trust by

17   insiders are precisely what the statutory

18   language is designed to cover. If a statute

19   prohibited accessing a warehouse with

20   authorization -- with -- with authorization and

21   using such access to obtain items in the

22   warehouse that the accessor is not entitled so

23   to obtain, everyone would understand that

24   language to cover an employee who's allowed to

25   take items for work who instead takes them for

1   himself.

2   Section 1030 used the same language to

3   extend the same property-based protection to the

4   private computer records that contain our most

5   sensitive financial, medical, and other data.

6   Petitioner's trying to gut the statute

7   and leave all of that data at the mercy of

8   anyone who ever has any legitimate ground to see

9   it under any circumstance. But, in doing that,

10   he fails to give effect to every word of the

11   statute, as his answer to Justice Kagan showed,

12   and he ignores its clear history and design, as

13   his answer to Justice Breyer showed.

14   He's -- what he's -- what he's instead

15   relying on here is a wild caricature of our

16   position that tries to bury his own heartland

17   statutory violation beneath an imaginary

18   avalanche of hypothetical prosecutions that he

19   can't actually identify in the real world for

20   seemingly innocent conduct.

21   But those invented cases would

22   implicate textual limits, such as the need for

23   an authorization-based system, and use of the

24   access to reach otherwise inaccessible data that

25   his own conduct clearly satisfies.

1   CHIEF JUSTICE ROBERTS: Mr. Feigin, is

2   your friend correct that everyone who violates a

3   website's terms of service or a workplace

4   computer use policy is violating the CFAA?

5   MR. FEIGIN: Absolutely not, Your

6   Honor. And I think the reasons are different in

7   the two hypotheticals you've given.

8   First of all, on the public website,

9   that is not a system that requires

10   authorization. It's not one that uses required

11   credentials that reflect some specific

12   individualized consideration.

13   CHIEF JUSTICE ROBERTS: Okay. Then

14   limit my -- my question to any computer system

15   where you have to, you know, log on.

16   MR. FEIGIN: So, Your Honor, I don't

17   think all log -- all systems that require you to

18   log in would be authorization-based systems

19   because what Congress was driving at here are

20   inside --

21   CHIEF JUSTICE ROBERTS: All right.

22   Well, then every -- every system that has a

23   password.

24   MR. FEIGIN: No, Your Honor, and let

25   me explain why. What Congress was aiming at

1   here were people who are specifically trusted,

2   people akin to employees, the kind of person you

3   -- that had actually been specifically

4   considered and individually authorized.

5   I don't think we say that about --

6   CHIEF JUSTICE ROBERTS: Well -- well,

7   you just talked about what Congress was aiming

8   at. I'm -- I'm concerned with the text of the

9   statute.

10   MR. FEIGIN: Sure, Your Honor. I

11   think this -- this text -- our reading of the

12   text is consistent -- reading of the word

13   "authorization" to mean -- require

14   individualized consideration makes sense in this

15   context. It's consistent with the Court's

16   decision in Washington County and the dictionary

17   definitions cited in pages 37 to 38 of our

18   brief. And I think it makes sense as just a

19   matter of plain English.

20   I don't think you'd say that a system

21   -- that the Museum of National African American

22   History and Culture required authorization to

23   enter when you had a sign-up sheet and anybody

24   from the public could come in, they just had to

25   register for a particular time.

1   Services like Facebook and Hotmail

2   that will give accounts to anybody who has a

3   pulse and -- and even people who don't, because

4   they don't really check, those aren't

5   authorization-based systems.

6   And I -- I think that narrow meaning

7   makes a great deal of sense in the statute, and

8   it takes care of, like, nearly an entire parade

9   of horribles.

10   CHIEF JUSTICE ROBERTS: Well, I don't

11   understand your -- your example of the museum.

12   I mean, if the guard says -- it would be natural

13   for him to say, are you authorized to enter at

14   this time? I don't -- I don't know -- I don't

15   understand your focus on authorization as a

16   limiting term.

17   MR. FEIGIN: Well, Your Honor, I think

18   authorization clearly, as the Court used it in

19   Washington County and as various dictionaries

20   use it, refers to some level of consideration

21   and affirmative thought-out permission.

22   And the question there is --

23   CHIEF JUSTICE ROBERTS: Thank you,

24   counsel.

25   Justice Thomas.

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1            JUSTICE THOMAS:  Thank you, Mr. Chief
2     Justice.
3            Mr. Feigin, I'd like you to respond to
4     Mr. Fisher's argument about the Rule of Lenity.
5     He seems to think that even if this is a toss-up
6     or it looks like a toss-up, we should rely on
7     that since this is a criminal statute.  What's
8     your response to that?
9            MR. FEIGIN:  I have two, Your Honor.
10    Number one -- and I'm happy to get into this --
11    I don't think there's -- this is a grievously
12    ambiguous statute or even an ambiguous one.  I
13    think it clearly supports us, and his reading is
14    textually insupportable.
15           The second -- and I'll get back to
16    that in a second -- but the second thing I'd say
17    is, if the Court does think the Rule of lenity
18    ought to apply here, I think the better place to
19    apply it is on words like "authorization," as I
20    was just discussing with the Chief Justice, or
21    the word "use," which I think really has to
22    require that the access is instrumental to
23    obtaining data that the user -- that would
24    otherwise be inaccessible.
25           If you'd like, I can drill down on
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1   that textual point.

2   JUSTICE THOMAS: No, that's -- that's

3   good enough. I'd like -- I'd like to go to

4   something slightly different.

5   The language in -- before the '84

6   amendments seemed to cover this more precisely

7   or expressly. Of course, we have a change in

8   there are fewer words, and it -- it flows a bit

9   better, but would you work through -- would you

10   explain your -- without getting too much in the

11   legislative history, the change in language and

12   why you think it actually expands its coverage

13   as opposed to compressing it, as Mr. Fisher

14   seems to think?

15   MR. FEIGIN: Your Honor, I don't know

16   that it expands it so much as it -- it really

17   just clarifies it. I mean, it's much simpler

18   and more concise.

19   And I think one thing that it does is,

20   if you look at the previous language, I think it

21   was potentially subject to the interpretation

22   that you had to look to the purposes the --

23   behind the authorization, like why is this

24   particular person authorized to use the system,

25   whereas the current language is much more

1   focused on the express limits that are inherent

2   in the authorization itself. And I think it

3   really clarifies that point and doesn't --

4   doesn't invite any -- any further inquiry.

5   And, Your Honor, I -- I know the

6   question was made without reference to

7   legislative history, but I think the legislative

8   history is quite clear that -- on -- on this

9   particular point.

10   JUSTICE THOMAS: Thank you.

11   CHIEF JUSTICE ROBERTS: Justice

12   Breyer.

13   JUSTICE BREYER: Well, I take it that

14   if I go to my PC, there are, seems to me, dozens

15   and dozens and dozens of sites where they say

16   you may enter this site and use the information

17   here if you agree to the following terms of

18   access. And then you have a big list in small

19   print that goes on for quite a long ways, pages.

20   I take it that would be covered and the terms of

21   access would be what's permitted and what isn't,

22   authorized and not, correct?

23   MR. FEIGIN: No, Your Honor.

24   JUSTICE BREYER: No? Why not?

25   MR. FEIGIN: "Authorization" in this

1   statute has a meaning of being granted specific

2   individualized permission. And so --

3   JUSTICE BREYER: I'm not granted that

4   when I -- they say in this piece of paper -- or

5   not on a piece of paper -- it says in the thing,

6   you've -- here are the terms of access, you can

7   -- you can use whatever we're giving on this

8   site for the following purposes but not for the

9   other purposes. Now that isn't covered?

10   MR. FEIGIN: No, Your Honor, no more

11   so than, I think, you would think that your --

12   you've been specifically authorized to enter if

13   you walk into a building and there's a sign

14   posted on the outside about some things you're

15   not supposed to do in a building.

16   I -- the word "authorization" under

17   the dictionary definitions that this Court made

18   clear in Washington County requires some kind of

19   individualized permission. And --

20   JUSTICE BREYER: So, if your employer

21   tells you, Mr. Jones, you work for me, here is a

22   PC, you will get all kinds of e-mails on this

23   PC, you are never to use this e-mail for a

24   personal purpose, and then he does, uses it for

25   personal purposes --

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 1              MR. FEIGIN:  So --
 2              JUSTICE BREYER:  -- that doesn't
 3    violate the statute?
 4              MR. FEIGIN:  So, Your Honor, this gets
 5    to the second limiting feature of the statute.
 6    So let -- let's assume it's an employee who has
 7    satisfied the definition of authorization.  He's
 8    been specifically individually authorized to use
 9    the computer.  I don't think the word "use"
10    necessarily requires that the user do something
11    the user couldn't otherwise do.
12              And I think there's two reasons for
13    that in this statute.  First, the statute refers
14    separately to accessing the computer and using
15    the access, which shows that using the access
16    has a further narrowing function.
17              And, second, the user has to use the
18    access, not just the computer itself.  So if I
19    -- you decide to send an e-mail to your friend
20    about when you're going to have lunch together,
21    and that's something you could do from your
22    phone, there's nothing special about using the
23    access.
24              I point you back to the warehouse
25    example I gave in -- in -- in my introductory
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1   remarks that just substitutes the word

2   "warehouse" for "computer" and "items" for

3   "information." I don't think we'd have any

4   trouble really understanding these distinctions.

5   If that's a statute that's aimed at insiders who

6   are people trusted to get into the warehouse who

7   do obtain the items in -- in ways that they're

8   not supposed to obtain, then I don't think we'd

9   -- we think it would be covering these -- these

10   other kinds of scenarios.

11   If I were to tell you that -- if I

12   were to talk about a statute where somebody

13   steps on a ladder and uses such step to retrieve

14   an item, you'd think it was an item that the

15   person couldn't get without stepping on the

16   ladder and using the ladder, not an item that

17   was easily reachable from the ground.

18   CHIEF JUSTICE ROBERTS: Justice Alito.

19   JUSTICE ALITO: Well, I find this a

20   very difficult case to decide based on the

21   briefs that we've received. In response to the

22   concerns about the effect on personal

23   property -- personal privacy of adopting

24   Mr. Fisher's recommended interpretation, he says

25   don't worry about that because there are other

        1   statutes that cover it, but I don't really know

        2   what those statutes are in many of those

        3   instances.

        4   And on your side, with respect to the

        5   argument that adopting your interpretation would

        6   criminalize all sorts of activity that people

        7   regard as largely innocuous, you suggest that

        8   there are limiting instructions, but -- limiting

        9   interpretations, but I don't know exactly what

       10   they are.

       11   And it would really be helpful to see

       12   them in writing. So what exactly is

       13   authorization? What exactly does it mean to

       14   obtain or alter information? What is this

       15   statute talking about when it speaks of

       16   information in the computer?

       17   All information that somebody obtains

       18   on the web is in the computer in a sense. I

       19   have a feeling that's not what Congress was

       20   thinking about when it adopted this. So I don't

       21   really know what to do with -- I don't really

       22   understand the potential scope of this statute

       23   without having an idea about exactly what all of

       24   those terms mean.

       25   What -- what help can you give us on

1   that? Is this something that would be -- would

2   be helpful to have specific briefing on the

3   meaning of all these terms?

4   MR. FEIGIN: Well, Your Honor, I

5   actually think the answer to that is no, and the

6   problem you're facing is because of the way

7   Petitioner has teed up the case for you.

8   Petitioner is focusing on only one very small

9   bit of the language here, the entitled "so"

10   language, and hinging his entire parade -- he's

11   asking -- then he's trotting out this parade of

12   horribles and telling you the only way to avoid

13   it is to interpret that language, which I think

14   is quite clear, in his manner as a way that

15   would get rid of all the privacy protection that

16   the statute provides.

17   There are all these other limitations

18   that Your Honor has pointed to. I don't think

19   this is the case in which we can brief them

20   because he acknowledges that his own conduct

21   satisfies them.

22   We have identified for the Court the

23   ways in which -- some ways in which courts could

24   limit these things. I think the proof is in the

25   pudding, which is that I believe it was Your

1   Honor who asked him where the parade really is,

2   and he could identify two members of the parade;

3   one was the Drew case that didn't actually

4   result in a sustained conviction, and the other

5   was a Ticketmaster case in which the defendant

6   hired Bulgarian hackers to circumvent some

7   technological limitations.

8   And I think that shows that

9   everybody's understood this statute not to cover

10   that kind of conduct and to cover the kind of

11   conduct that's at issue here today --

12   CHIEF JUSTICE ROBERTS: Justice

13   Sotomayor.

14   MR. FEIGIN: -- just like the Court --

15   CHIEF JUSTICE ROBERTS: Justice

16   Sotomayor.

17   JUSTICE SOTOMAYOR: Counsel -- I'm

18   sorry, Mr. Feigin. My problem is that you are

19   giving definitions that narrow the statute that

20   the statute doesn't have. You're asking us to

21   write definitions to narrow what could otherwise

22   be viewed as a very broad statute and

23   dangerously vague.

24   But more importantly to me, you said

25   that there is no ambiguity in this statute, but

1   let me give you an example. Imagine a law that

2   says anyone who drives on Elm Street who is not

3   authorized so to drive shall be punished.

4   The "so to drive" to me could mean if

5   you're not authorized to drive on Elm Street.

6   But, under your theory, it could be and might

7   very possibly be read as saying you can't ride

8   on Elm Street if you're driving on it with an

9   illegal purpose, you're speeding, you're

10   breaking the law on curfew, you're texting. It

11   could even cover people who drive on Elm Street

12   on their way to commit a different crime,

13   because they weren't authorized to be on Elm

14   Street for the purpose of committing a crime.

15   So, to me, if all you're relying on is

16   that word "so," I don't get around the

17   ambiguity, especially when the other side points

18   to so many examples in the criminal code where

19   the "so" refers to the -- in the manner that has

20   just been described.

21   MR. FEIGIN: Well, Your Honor, what I

22   think he -- or what I think Petitioner relies

23   both at argument today and on page 3 of his

24   reply brief is that "so" in this statute doesn't

25   refer back to accessing the computer. It refers

1   back to use such access.

2   Everyone agrees that "so" means in

3   that manner, and the statute refers to a

4   particular discrete act. So, if on some

5   occasion a user is not entitled to use his

6   access to obtain certain information, I think

7   he's clearly violated the statute.

8   He tries to get around that --

9   JUSTICE SOTOMAYOR: Don't you think

10   your -- Mr. Feigin, doesn't your reading sort of

11   render superfluous the second part of the

12   statute? I think what you're arguing is, if I'm

13   not authorized to go on the computer for this

14   purpose, then we don't need the second half of

15   the statute.

16   MR. FEIGIN: Are you talking about the

17   "without authorization" prong, Your Honor?

18   JUSTICE SOTOMAYOR: Exactly.

19   MR. FEIGIN: Actually, Your Honor, I

20   think it --

21   JUSTICE SOTOMAYOR: Well, without

22   authorization or exceeding -- or -- or exceeding

23   authorization access.

24   MR. FEIGIN: Sure. Your Honor, I

25   actually think it's their reading that collapses

1   the two prongs because, if all Congress were

2   concerned about were people who get information

3   they're not supposed to obtain, it would have a

4   simple one-prong statute that criminalizes

5   accessing a computer and obtaining information

6   that the accessor is not entitled to obtain.

7   Instead, it broke out a piece for

8   without -- people who access without

9   authorization, the hackers, and people who

10   exceed authorized access, the insiders. And the

11   main danger that insiders present is the precise

12   danger that this case exemplifies.

13   JUSTICE SOTOMAYOR: One last question,

14   counsel. Why do we need other parts of the

15   statute, like 3030(a)(4), that speaks about

16   exceeding authorized access for fraudulent

17   purposes? Under your theory of the case, that

18   is a completely superfluous provision.

19   MR. FEIGIN: No, Your Honor.

20   Something that would come in under (a)(4) but

21   not (a)(2)(C) would be, for example, somebody at

22   Amazon who has access to the ordering database

23   who modifies that database to get an extra item

24   delivered to him or herself.

25   CHIEF JUSTICE ROBERTS: Justice Kagan.

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1              JUSTICE KAGAN:  Mr. Feigin, if -- if I

2     understand your brief correctly, you would

3     concede, wouldn't you, that if the word "so"

4     wasn't there, you would lose this case?

5              MR. FEIGIN:  I think it would be a

6     much tougher case for us without the word "so,"

7     Your Honor.

8              JUSTICE KAGAN:  Okay.  So then the

9     question is what does "so" mean, and picking up

10    on what you were saying to Justice Sotomayor, if

11    I understand Mr. Fisher's argument, he says "so"

12    means by accessing a computer.

13              And you just said "so" means by using

14    your access.  And why is it that we should pick

15    your choice of the prior reference rather than

16    his choice of the prior reference?

17              MR. FEIGIN:  The anti-surplusage

18    canon, Your -- Your Honor.  If all "so" is doing

19    in a statute -- and this is his reading -- if

20    all "so" is doing in the statute is to make sure

21    that the statute covers someone who could get

22    similar information from a non-computerized

23    source, then it's entirely surplusage.

24              JUSTICE KAGAN:  I think he disputes

25    that and I think he has a point here.  He's
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1   saying that what that prevents is using the

2   statutes in -- in -- as to cases where you could

3   obtain the information in a non-digital manner.

4   MR. FEIGIN: Well, Your Honor, the

5   information is -- the statute's already limited

6   to information in the computer. That is the

7   computer record, the bits and bytes. And I can

8   -- that has to be the case because the statute

9   covers not only obtaining but also altering.

10   When it refers to altering information

11   in the computer, surely it's referring to

12   altering the specific record of, say, my

13   birthday, rather than the abstract fact of the

14   day I was born simply because it happens to be

15   contained in a computer or in the computer that

16   was accessed.

17   And so, if we're limiting this to

18   people who can't use their computer access, as

19   opposed to having somebody read them something

20   over the phone, then that limitation's already

21   quite clearly baked into the statute.

22   JUSTICE KAGAN: Thank you, Mr. Feigin.

23   CHIEF JUSTICE ROBERTS: Justice

24   Gorsuch.

25   JUSTICE GORSUCH: Good morning, Mr.

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 1      Feigin.  I guess I'm -- I'm curious about a -- a

 2      bigger picture question, and that is this case

 3      does seem to be the latest, as -- as the

 4      Petitioner's pointed out, in a rather long line

 5      of cases in recent years in which the government

 6      has consistently sought to expand federal

 7      criminal jurisdiction in pretty significantly

 8      contestable ways that this Court has rejected,

 9      whether we're talking about Marinello or

10      McDonnell or Yates or Bond.  You pick your

11      favorite recent example.

12              And I'm just kind of curious why we're

13      back here again on a -- a -- a rather small

14      state crime that -- that is prosecutable under

15      state law and perhaps under other federal laws

16      to try and address conduct that -- that would be

17      rather -- rather -- rather remarkable, perhaps

18      making a federal criminal of us all.

19              MR. FEIGIN:  Well, Your Honor, we

20      don't think the statute does that for -- for

21      reasons I -- I've tried to explain and we get

22      into in our briefs.  And we do think the statute

23      is aimed at -- at precisely this sort of thing.

24      And I -- I can give you several examples of --

25              JUSTICE GORSUCH:  But I'm -- I'm --
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 1   I'm asking a bigger question, and that is there

 2   is -- there's -- there's this pattern, and I

 3   would have thought that the Solicitor General's

 4   Office isn't just a rubber stamp for the U.S.

 5   Attorney's Offices and that there would be some

 6   careful thought given as to whether this is

 7   really an appropriate reading of these statutes

 8   in light of this Court's holdings over now about

 9   10 years, maybe more, in similar laws.

10   MR. FEIGIN: Your Honor, we do think

11   this is the correct reading of the specific

12   narrow portion of the language that is at issue

13   here.

14   We do not think that every prosecution

15   that they're positing or even every prosecution

16   we've brought, let's take the Drew prosecution

17   as an example, is one that would validly be

18   brought under this statute.

19   But the kind of misconduct we have

20   here, where a police officer tips off a criminal

21   about something, is exactly the kind of

22   misconduct that the statute was aimed at,

23   because the police officer is abusing his trust

24   and has access to state and -- and national

25   databases which he is -- Petitioner here abused.

1   JUSTICE GORSUCH: Thank you, Mr.

2   Feigin.

3   CHIEF JUSTICE ROBERTS: Justice

4   Kavanaugh.

5   JUSTICE KAVANAUGH: Thank you, Chief

6   Justice.

7   And good afternoon, Mr. Feigin.   Let's

8   focus on the text a bit.   I'd look at the text

9   and think "accesses a computer without

10   authorization" means someone who gets on a

11   computer that they're not allowed to get on.

12   And "exceeds authorized access and obtains

13   information," I would think, means you're

14   allowed onto the computer, but you go into a

15   file that you're not allowed to access and that

16   those two things are what the statute might

17   speak to and that disclosure of information that

18   you obtain or misuse of information you obtain

19   is something distinct.

20   But merely browsing around, obtaining

21   the information, that you're not -- in a file

22   you're not allowed to look at is what that

23   second prong is getting at.

24   So why is that wrong as a textual

25   matter?

1   MR. FEIGIN: Well, a couple of points,

2   Your Honor.

3   First, I -- I don't think that's all

4   the second -- I -- I don't think that's -- if

5   that's all the second prong covers, then,

6   basically, that's just like saying, if we do a

7   brick-and-mortar analogy, this is like saying

8   you can't -- it's a crime to go into the back

9   office -- for an employee of a store to go into

10   the back office and take money out of the shoe

11   box where we keep petty cash because he's not

12   allowed ever to get at the petty cash box.

13   But he can take as much money as he

14   wants for himself out of the cash register

15   because he's entitled to go into the cash

16   register to make change.

17   It's -- so it's not just limited to

18   files. We do think it -- it goes to the limits

19   of the authorization.

20   The -- the second point I would make,

21   just to get back to the text here, Your Honor,

22   is that, as I was trying to explain earlier to

23   the Chief Justice, authorization has a meaning

24   here, and everyone, I think, can fairly agree

25   that the meaning -- one meaning of

1   "authorization" is that you have given someone

2   specific permission. That's the definition that

3   we've cited in our briefs, and it's amply

4   supported. And the question -- there might be

5   questions how specific the permission has to be,

6   but, in context, I think the permission needs to

7   be fairly specific.

8   So there are going to be a number of

9   systems that aren't necessarily covered by

10   either prong directly --

11   JUSTICE KAVANAUGH: Again --

12   MR. FEIGIN: -- that would be --

13   JUSTICE KAVANAUGH: -- I'm sorry to

14   interrupt, but I -- I want to get one more

15   question in.

16   MR. FEIGIN: Yes.

17   JUSTICE KAVANAUGH: I think you

18   acknowledged to Justice Kagan that you would be

19   in trouble here if the word "so" were deleted.

20   And you relied on the surplusage canon, but she

21   pointed out that there is some meaning offered

22   by Petitioner to the word "so."

23   But even if it were surplusage, that

24   -- that canon can only take you so far, and this

25   would be, as Justice Gorsuch said, a fairly

1   substantial expansion of federal criminal

2   liability based on one word that you're saying

3   we have to interpret a particular way because of

4   avoiding surplusage.

5   Can you respond to that quickly?

6   MR. FEIGIN: Well, let me say a couple

7   of quick things about that.

8   One is -- this may sound a little

9   trite, but just because the word's two letters

10   doesn't mean the anti-surplusage canon ought --

11   ought not to apply.

12   The second thing I'd say is that the

13   word "so" here really does ensure that this is

14   covering the kind of conduct that Congress

15   wanted to cover. He would be -- like, it --

16   without our interpretation, this is going to

17   leave open anybody to use any information that

18   they have -- or -- or look up any information

19   for any -- under any circumstances whatsoever so

20   long as there's some narrow conceivable

21   circumstance under which they'd be allowed to do

22   so. And that doesn't --

23   CHIEF JUSTICE ROBERTS: Justice

24   Barrett.

25   MR. FEIGIN: -- really make a lot of

1   sense.

2   JUSTICE BARRETT: Good afternoon,

3   Mr. Feigin. I want to follow up on Justice

4   Kavanaugh's question. The interpretation that

5   he offered to you of that language, "accesses a

6   computer without authorization or exceeds

7   authorized access," is similar to the kind of

8   on/off switch that I was describing to Mr.

9   Fisher since you're either authorized to be

10   there or you're not, and it doesn't really take

11   into account questions of scope.

12   You say that "so" is what really makes

13   your argument. So are you saying that there

14   isn't any kind of inherent idea of a scope of

15   authorization simply in the word "authorize"

16   itself?

17   MR. FEIGIN: There -- there is

18   inherent in the word "authorized" the scope of

19   authorization, Your Honor. I -- I think that is

20   -- the access is the authorized access, and then

21   you're using the access in -- in a manner you're

22   not -- you're not permitted so -- so to use it.

23   So you are exceeding a limit on your

24   authorization. But I think "so" actually refers

25   back to the word "access."

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 1              But I -- I -- just to clear up the --
 2    any confusion here, to -- the -- the word
 3    "authorization" refers to specific
 4    individualized permission, and there are going
 5    to be systems that don't really require that at
 6    all.  And so, if I access a public website, you
 7    know, just like I wouldn't really normally talk
 8    about going to a public park with or without
 9    authorization, it's just a thing everyone can
10    do, that wouldn't be a system -- a public
11    website wouldn't be a system that has
12    authorization --
13              JUSTICE BARRETT:  I mean, it seems to
14    me --
15              MR. FEIGIN:  -- in the sense used by
16    the --
17              JUSTICE BARRETT:  -- though, you're
18    attributing an awful lot of specificity to the
19    word "authorization" that it doesn't, you know,
20    have.  You can have very specific authorization
21    from an employer -- I mean, even from a
22    professor.  What if a professor teaching a
23    class, a small class, very individualized, 12
24    seminar students, and she says you may use a
25    computer in class to take notes but for no other
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1   reason?

2   MR. FEIGIN: Well, Your Honor, I --

3   JUSTICE BARRETT: For instance, check

4   personal Gmail.

5   MR. FEIGIN: Well, Your Honor, I don't

6   think that -- I don't think that's the kind of

7   authorization the statute's referring to. It's

8   talking about authorization by the owner of the

9   computer data, not just some external constraint

10   that's placed on anybody.

11   And I think that would be problematic

12   even under Petitioner's reading of the statute

13   because, all of a sudden, you're prohibited from

14   going into any file in your computer, and the

15   person has flatly prohibited that for that

16   period of time.

17   So he doesn't really avoid that. The

18   same way his parent/child hypothetical falters

19   on his own reading of the statute because you

20   could -- I could instruct my child not to go

21   into a particular file or use a particular

22   program.

23   I -- I -- I understand the Court's

24   reaction that we are pointing to a bunch of

25   limitations and trying to kind of spec them out,

 1   but I really think that's a problem with the way

 2   Petitioner's teed up this case. He's focused on

 3   this very limited, specific portion of the

 4   language. He's then argued that unless you do

 5   what he wants, all of this other stuff's going

 6   to be opened up. And we don't have much case

 7   law on the other stuff because nobody has ever

 8   really made any sustained effort to try to bring

 9   those kinds of cases. They certainly haven't

10   resulted in any kind of liability.

11   Our point here isn't to defend or --

12   any particular case that isn't this one. And to

13   the extent we start to see cases like that,

14   that'll give courts, including this Court if

15   necessary, the opportunity to further articulate

16   those limits. I mean, it shouldn't --

17   CHIEF JUSTICE ROBERTS: A minute to

18   wrap up, Mr. Feigin.

19   MR. FEIGIN: Thank you, Your Honor.

20   I think -- just to continue with what

21   I was saying, I think what the Court should not

22   do is to interpret this particular portion of

23   the statute in an atextual manner that's

24   different from how the Court viewed the plain

25   language in Musacchio in order to avoid a parade

1   of hypotheticals that hasn't really occurred.

2   I mean, let me give you some examples

3   of things that, on his reading, wouldn't be

4   covered by this or any other federal statute so

5   -- so far as we know. A police officer tipping

6   off a friend with insider information that he

7   got from a database; he knows the friend is a

8   criminal, but he doesn't know the purpose to

9   which the friend's going to put it, so he can't

10   -- we can't get him for attempt, we can't get

11   him for conspiracy.

12   Someone who's leaving a company and he

13   takes the entire customer database with him,

14   it's not a trade secret, he just wants to use it

15   for himself. Or an IT technician at a court who

16   reveals predecisional e-mails from the court's

17   e-mail server.

18   Thank you, Your Honor.

19   CHIEF JUSTICE ROBERTS: Thank you,

20   counsel.

21   Rebuttal, Mr. Fisher?

22   REBUTTAL ARGUMENT OF JEFFREY L. FISHER

23   ON BEHALF OF THE PETITIONER

24   MR. FISHER: Thank you. I'd like to

25   make two textual points and one consequences

1   point.

2   First, as to the text, I don't think

3   it matters if Mr. Feigin said whether "so"

4   refers strictly to accessing the computer with

5   authorization or whether it refers to such

6   access. Either way, it's referring to the

7   manner of getting the information, which is by

8   computer.

9   And I think that also disposes of his

10   surplusage argument about the words later in the

11   statute "in the computer." Yes, it picks up "in

12   the computer," but that same information might

13   be available from some other source. And so

14   that's what "so" is doing.

15   The second textual point is about the

16   word "authorization." The government clearly is

17   putting an enormous amount of weight on that

18   term in this statute. But there's just very

19   serious problems with that.

20   For one thing, the statute talks about

21   either with authorization or without

22   authorization. And so, if you're going to say

23   that none of these public-facing websites are

24   being accessed with authorization, then it might

25   be they're all being accessed without

 1   authorization, which would open up a whole other

 2   set of problems.

 3   But even as to the plain meaning of

 4   the term that Mr. Feigin proposes, it just

 5   escapes me why logging into your work computer

 6   does not establish authorization or logging into

 7   your Westlaw account or satisfying an age-based

 8   restriction on Facebook or being single and

 9   therefore being authorized to use a dating

10   website, et cetera, et cetera.

11   All of these websites and work

12   computers are accessed only with authorization,

13   as even Mr. Feigin defines the term, and so that

14   doesn't meaningfully narrow the statute.

15   And then I think what you're left with

16   is this problem about consequences. And the

17   best thing the government can say is we haven't

18   brought a whole bunch of these prosecutions yet.

19   Remember, even the government's 2014 charging

20   policy doesn't talk about any of these other

21   restrictions Mr. Feigin has been talking about

22   today. Instead, what it says is federal

23   prosecutors "may" decide not to bring these

24   kinds of cases.

25   But, for all the textual reasons we've

 1   described, they would be available under the

 2   government's reading. And then you're -- I

 3   think you're left with Justice Gorsuch's point,

 4   which is the Court over and over again has had

 5   cases in recent years and even further back,

 6   cases like Kozminski, where the government

 7   offers a reading of a federal statute that would

 8   sweep in everyday conduct, and it's never been

 9   an answer to that kind of an argument to say

10   trust us, we won't bring those kinds of cases,

11   or even saying construe the statute the way we

12   ask now, and if those problems arise in the

13   future, then you can address them.

14   What the Court has done in every one

15   of those cases is apply the traditional tools of

16   construction to say any ambiguity in the statute

17   must be construed narrowly because of fair

18   notice and other -- federalism and related

19   principles.

20   So, for those reasons, we'd ask the

21   Court -- ask the Court to reverse.

22   CHIEF JUSTICE ROBERTS: Thank you,

23   counsel. The case is submitted.

24   (Whereupon, at 12:42 p.m., the case

25   was submitted.)

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